Yee Teck Fah t/a Yee Teck Fah & Co v Lim Soo Chooi

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO A12–290 OF 2010 (RS 143/2010)A
SURAYA OTHMAN J
31 MAY 2011

Civil Procedure — Transfer of proceedings — From one sessions court to another — Whether Butterworth Sessions Court had territorial jurisdiction to hear plaintiff's claim filed in Shah Alam Sessions Court — Whether sessions courts had concurrent and coordinate jurisdiction of each other — Whether local jurisdiction of sessions courts followed that of respective High Courts — Whether forum conveniens dictated action should be heard and determined in Shah Alam court

The plaintiff, an advocate and solicitor, filed an action ('the suit') against the defendant in the sessions court at Shah Alam, Selangor, to recover professional fees and disbursements due to him for services rendered. Three years later, the court allowed the defendant's application to transfer the suit to the Sessions Court at Butterworth, Penang. Dissatisfied with the decision, the plaintiff appealed to the High Court. The plaintiff argued that the defendant's application was baseless and misconceived as it did not state or invoke the relevant law and/or procedural rule under which it was made. He said that his practice and office, his residence and the place where the cause of action in the suit arose, were all in Selangor. The plaintiff also said that pursuant to s 59(1) of the Subordinate Courts Act 1948 ('SCA') and High Court Practice Direction 4 of 1993 — where the then Chief Justice of Malaya had assigned to Shah Alam Sessions Court the territorial jurisdictional area of Petaling Jaya and Kajang — only the Shah Alam Sessions Court, and no other, had territorial jurisdiction to hear and determine the plaintiff's claim. The defendant, relying on the authority of *Public Prosecutor v Segaran a/l S Mathavan* [2009] 9 MLJ 597, contended that as no local limits of jurisdiction had been assigned to the sessions courts by the Yang di-Pertuan Agong as enabled by s 59(1) of the SCA, the sessions courts had jurisdiction, by s 59(2) of the SCA, to hear and determine any cause or matter arising in any part of the local jurisdiction of the respective High Court. The defendant also contended that the forum conveniens for the suit was the Butterworth Sessions Court and not the one in Shah Alam.

Held, allowing the appeal with no order as to costs:

(1) Although the Butterworth Sessions Court, like its Shah Alam counterpart, had territorial jurisdiction to hear and determine the plaintiff's claim since they enjoyed concurrent and coordinate

jurisdiction of each other, it was more suitable and appropriate for the suit to be heard in the Shah Alam Sessions Court (see paras 20 & 36). A

(2) The defendant had failed to satisfy the court that the Butterworth Sessions Court was the more appropriate forum considering the defendant himself had opted to engage the plaintiff's legal firm in Petaling Jaya, where the plaintiff resided and carried on his business, the witnesses were mainly from or near Shah Alam and the cause of action accrued in Selangor (see para 36). B

(3) Under s 59(1) of the SCA, only the Yang di-Pertuan Agong had the power to assign local limits of jurisdiction to the sessions courts and since no such assignment had been made, the sessions courts, by s 59(2), had the same local jurisdiction as the High Courts as defined under s 3 of the Courts of Judicature Act 1964 (see para 18). C

(4) The Sessions Courts of Malaya, just like the High Courts of Malaya, could sit anywhere, at any branch, in Peninsular or West Malaysia. Likewise, the Sessions Courts of Sabah and Sarawak, just like the High Courts of Sabah and Sarawak, could sit anywhere, at any branch in Sabah and Sarawak, or East Malaysia. Both the High Courts and the sessions courts had the same territorial (local) jurisdiction and as such the sessions courts, just like the High Courts, enjoyed concurrent and coordinate jurisdiction of each other (see para 19). D E

[Bahasa Malaysia summary

Plaintif, seorang peguambela dan peguamcara, memfailkan suatu tindakan ('guaman tersebut') terhadap defendan di Mahkamah Sesyen Shah Alam, untuk mendapatkan semula yuran guaman dan pembelanjaan bagi khidmat yang telah diberikan. Tiga tahun kemudian, mahkamah membenarkan permohonan defendan untuk memindahkan guaman tersebut ke Mahkamah Sesyen di Butterworth, Pulau Pinang. Tidak berpuas hati dengan keputusan itu, plaintif merayu ke Mahkamah Tinggi. Plaintif berhujah bahawa permohonan defendan tidak berasas dan disalah anggap kerana tidak menyatakan atau menggunapakai undang-undang relevan dan/atau peraturan prosedural di mana permohonan tersebut telah dibuat. Dia menyatakan bahawa amalan dan pejabatnya, kediaman dan tempat di mana kausa tindakan guaman ini berbangkit, semuanya di Selangor. Plaintif juga menyatakan bahawa berikutan s 59(1) Akta Mahkamah Rendah 1948 ('AMR') dan Arahan Amalan Mahkamah Tinggi No 4 Tahun 1993 — di mana Hakim Besar Malaya pada ketika itu telah memberikan kuasa kepada Mahkamah Sesyen Shah Alam bagi kawasan bidang kuasa wilayah Petaling Jaya dan Kajang — hanya kepada Mahkamah Sesyen Shah Alam, dan bukan yang lain, mempunyai bidang kuasa wilayah untuk mendengar dan menentukan tuntutan plaintif. Defendan, bergantung kepada autoriti *Public Prosecutor v Segaran a/l S Mathavan* [2009] 9 MLJ 597, berhujah bahawa memandangkan tiada batasan bidang kuasa F G H I

tempatan ditetapkan kepada Mahkamah-Mahkamah Sesyen oleh Yang di-Pertuan Agong seperti yang diberikan oleh s 59(1) AMR, Mahkamah-Mahkamah Sesyen mempunyai bidang kuasa, menerusi s 59(2) AMR, untuk mendengar dan menentukan sebarang kausa atau perkara berbangkit dalam mana-mana bidang kuasa tempatan setiap Mahkamah Tinggi. Defendan juga menghujah bahawa forum convenience bagi guaman tersebut ialah Mahkamah Sesyen Butterworth dan bukannya di Shah Alam.

Diputuskan, membenarkan rayuan tanpa perintah untuk kos:

(1) Walaupun Mahkamah Sesyen Butterworth, seperti di mahkamah Shah Alam, mempunyai bidang kuasa wilayah untuk mendengar dan memutuskan tuntutan plaintif disebabkan mempunyai bidang kuasa bersama dan menyelaras masing-masing, adalah lebih sesuai dan berpatutan bagi guaman tersebut didengar di Mahkamah Sesyen Shah Alam (lihat perenggan 20 & 36).

(2) Defendan gagal memuaskan mahkamah bahawa Mahkamah Sesyen Butterworth merupakan forum yang lebih sesuai memandangkan defendan sendiri telah melantik firma guaman plaintif di Petaling Jaya, di mana plaintif menetap dan menjalankan perniagaannya, saksi-saksi yang kebanyakannya dari Shah Alam dan kausa tindakan berbangkit di Selangor (lihat perenggan 36).

(3) Di bawah s 59(1) AMR, hanya Yang di-Pertuan Agong mempunyai kuasa untuk menetapkan batasan-batasan bidang kuasa tempatan bagi Mahkamah-Mahkamah Sesyen dan disebabkan tiada penetapan yang dibuat, Mahkamah-Mahkamah Sesyen, menerusi s 59(2), mempunyai bidang kuasa tempatan yang sama dengan Mahkamah-Mahkamah Tinggi seperti yang ditafsirkan di bawah s 3 Akta Mahkamah Kehakiman 1964 (lihat perenggan 18).

(4) Mahkamah-Mahkamah Sesyen Malaya, seperti Mahkamah-Mahkamah Tinggi Malaya, boleh bersidang di mana-mana, di mana-mana cawangan, di Semenanjung atau Malaysia Barat. Begitu juga, Mahkamah-Mahkamah Sesyen Sabah dan Sarawak, seperti Mahkamah-Mahkamah Tinggi Sabah dan Sarawak, boleh bersidang di mana-mana, di mana-mana cawangan di Sabah dan Sarawak, atau Malaysia Timur. Kedua-dua Mahkamah-Mahkamah Tinggi dan Mahkamah-Mahkamah Sesyen mempunyai bidang kuasa wilayah tempatan, dan oleh itu, Mahkamah-Mahkamah Sesyen, seperti Mahkamah-Mahkamah Tinggi, menikmati bidang kuasa bersama dan menyelaras masing-masing (lihat perenggan 19).]

Notes

For cases on transfer of proceedings from one sessions court to another, see 2(3) *Mallal's Digest* (4th Ed 2010 Reissue) paras 8754–8756.

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160, SC (refd)

Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd [2003] 5 MLJ 40, HC (refd)

Khor Seow Kee v Boon Hock Sawmill Sdn Bhd (1993) 4 CLJ 365, HC (refd)

Kilang Papan Pulai Sebang Sdn Bhd v Lim Trading & Co [2005] 1 MLJ 753, HC (refd)

Malacca Securities Sdn Bhd v Loke Yu [1999] 6 MLJ 112

Metro Kajang Construction Sdn Bhd v Eka Bahtera Sdn Bhd [2001] 6 MLJ 129, HC (refd)

Mohammad Idres s/o Mohd Sulaiman Shah v Malayan Banking Bhd [2001] 5 MLJ 111, HC (refd)

PP v Segaran a/l S Mathavan [2009] 9 MLJ 597, HC (refd)

Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 (refd)

Taman Rimba (Mentakab) Sdn Bhd v Sin Yew Poh Tractor Works [2002] 5 MLJ 321, HC (refd)

Usman bin Ahmad v Chin Brothers Construction Co [2001] 5 MLJ 281, HC (refd)

WJ Alan & Co Ltd V El Nasr Export & Import Co [1972] 2 All ER 127, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 3
Rules of the High Court 1980 O 41 rr 1(7), (8), 2(2)
Subordinate Courts Act 1948 s 59(1), 59(2), Third Schedule
Subordinate Courts Rules,\ 1980 O 25 r 22(1), (7), (8), s 99A

Yee Teck Fah (Yee Teck Fah & Co) for the appellant/plaintiff.
Tan Kah Hoo (Gan Teik Che & Ho) for the respondent/defendant.

Suraya Othman J:

INTRODUCTION

[1] On 17 March 2008, the defendant filed an application for a transfer of a civil case ('the said case') pending in the Sessions Court, Shah Alam, Selangor to the Sessions Court, Butterworth, Penang. On 31 March 2010, the learned sessions court judge ('sessions judge') allowed the defendant's application to transfer the said case. The plaintiff, dissatisfied with the order of the sessions judge, appealed to the High Court. It is from this decision/order that the

appeal before me now lies.

FACTS AND BACKGROUND

[2] The brief facts are as follows. The plaintiff, who is an advocate and solicitor claims for legal fees in the sum of RM179,430.22 being professional fees and disbursements due to him for services rendered to the defendant under bills dated 2. December 2005, 22 June 2006, 1 February 2007 and 1 March 2007. Despite repeated requests and demands, the plaintiff alleged that the defendant failed or neglected to pay the plaintiff the claimed sum and consequently, the plaintiff filed an action against the defendant ('said case') in the sessions court, Shah Alam, Selangor to recover the amount owed.

THE PLAINTIFF'S SUBMISSION

[3] Mr Yee Teck Fah, the plaintiff, who is an advocate and solicitor representing himself in this appeal submitted that the sessions courts unlike the High Courts do not enjoy concurrent territorial jurisdiction of each other. The sessions courts only have local limits of jurisdiction assigned to them and not otherwise which is expressly stated in s 59(1) of the Subordinate Courts Act 1948 (Act 92) ('SCA 1948'). The definition of 'local limits' is set out in the High Court Practice Direction No 4 of 1993('HCP 1993'), where the Chief Justice of Malaya then had assigned to Shah Alam Sessions Court the territorial jurisdictional area of Petaling Jaya and Kajang. Therefore according to s 59(1) of the SCA 1948 and the HCP 1993, only the Shah Alam sessions courts has territorial jurisdiction to hear and determine the plaintiff's claim. Thus the sessions judge erred in fact and/or law when she transferred the said case to Butterworth, Penang Sessions Court since the Butterworth, Penang Sessions Court has no territorial jurisdiction to hear and determined the plaintiff's claim arising outside its territorial limit. In this light, the plaintiff refers to the case of *Taman Rimba (Mentakab) Sdn Bhd v Sin Yew Poh Tractor Works* [2002] 5 MLJ 321 in support.

[4] Mr Yee Teck Fah contended that he, as an advocate and solicitor of the High Court of Malaya, is practicing and has his office at No 705 Block E, Phileo Damansara 1, No 9, Jalan 16/11, 46350 Petaling Jaya, Selangor Darul Ehsan. He also lives in the state of Selangor. The cause of action accrues in the state of Selangor where the breach in the form of payments due to him from the defendant for legal services rendered occurred.

[5] Mr Yee Teck Fah argued that the defendant's application is baseless and misconceived as it does not state and/or invoke the relevant law and/or procedural rule under which the defendant's application is being made for an order to transfer the said case to Butterworth, Penang Sessions Court. Such

failure according to Low Hop Bing J, (as he then was), in *Kilang Papan Pulai Sebang Sdn Bhd v Lim Trading & Co* [2005] 1 MLJ 753 renders the application devoid of any basis whatsoever.

[6] Mr Yee Teck Fah further submitted that the defect in the application is further compounded by the defendant's defective affidavits filed purportedly in support of the application. This argument is based on the fact that the defendant after having filed several affidavits in this action alleges for the first time in his affidavit affirmed on 12 May 2008 that he is illiterate in Bahasa Malaysia and the English language. If the defendant's allegation is true than all his affidavits must have jurats that fully comply with O 25 r 22(1), (7) and (8) of the Subordinate Courts Rules 1980 which is the equivalent of O 41 r 1(7), (8) and 2(2) of the Rules of the High Court 1980, failing which they are defective and must be rejected. This principle of law was applied in the case of *Metro Kajang Construction Sdn Bhd v Eka Bahtera Sdn Bhd* [2001] 6 MLJ 129.

THE DEFENDANT'S SUBMISSION

[7] Replying to the plaintiff's submission, counsel for the defendant, Mr Tan Kah Hoo, contended that the plaintiff's authority of *Taman Rimba (Mentakab) Sdn Bhd v Sin Yew Poh Tractor Works* has recently been distinguished by the High Court in *Public Prosecutor v Segaran a/l S Mathavan* [2009] 9 MLJ 597 where Yeow Wee Siam JC, held that:

> With utmost respect to James Foong J (as he then was) and the sessions court judge, I am of the humble view that s 59(2) must be read first of all with s 59(1) of the SCA. Under s 59(1) of the SCA, it is only the Yang di-Pertuan Agong who may by order constitute the sessions courts as he thinks fit, and he shall also have the power to assign the local limits of jurisdiction of the sessions courts. From a search done by my senior assistant registrar, it appears that so far, the Yang di-Pertuan Agong has not made any order under s 59(1) of the SCA, that has been gazetted, to assign the local limits of jurisdiction of each sessions court. That being the case, administratively, the sessions courts have been guided by the High Court Practice Directions No 2 of 1993 and 4 of 1993 regarding their local limits of jurisdiction. In my opinion, the practice directions serve very well for the day-to-day registration and hearing of cases in the various sessions courts listed in the two practice directions. However, when the vital issue arises, such as in this application before me, as to whether the PJ sessions court, under the Shah Alam sessions court, and the KL sessions already have local limits of jurisdiction assigned to them by order made by the Yang di-Pertuan Agong under s 59(1) of the SCA, then the answer is in the negative.

[8] Mr Tan Kah Hoo submitted that since *Taman Rimba (Mentakab) Sdn Bhd*'s case has been distinguished, and no local limits of jurisdiction has been assigned to each sessions court by the Yang di-Pertuan Agong, then, the sessions court has jurisdiction to hear and determine any cause or matter arising in any

part of the local jurisdiction of the respective High Court, which means that the sessions court has the same local jurisdiction of a High Court. As such the sessions court can sit anywhere, at any branch in Peninsular Malaysia or West Malaysia.

[9] In determining the territorial jurisdiction and powers of a sessions court, Mr Tan Kah Hoo further submitted that this court should, in addition to the considerations in paras 2 and 3 of the Third Schedule of the SCA 1948, bear in mind the doctrine of *forum conveniens* as noted by Peh Swee Chin FCJ, in *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 (SC) and the case of *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268.

[10] As regard to the procedural issues, Mr Tan Kah Hoo pointed out that the plaintiff has waived his right to raise procedural objections and is estopped from doing so as there was no indication by the plaintiff that any procedural objections would be raised, whether by affidavits, correspondences or even during the hearings in the court below. Therefore the plaintiff has refused, neglected and/or failed to give the defendant any notice of any preliminary objection as to the alleged non-compliance of the defendant's affidavits and/or notice of application. This has led the defendant to believe and act in the knowledge that the plaintiff had by his conduct waived his right to raise any preliminary objections.

ISSUES BEFORE THE COURT

[11] The issues before the court are:

(a) what is the territorial jurisdiction of the sessions courts;

(i) whether the sessions courts have the restriction of local limits of jurisdiction assigned to them;

(ii) if no local limits of jurisdiction have been assigned to them, whether the sessions courts have the same local jurisdiction as the High Courts.

(b) what is the 'forum conveniens' of this case: whether it is the Shah Alam, Selangor sessions court or the Butterworth, Penang sessions court;

(c) what is the effect of non-compliance to the procedural rules in making the application by the defendant.

FINDINGS OF THE COURT

[12] *What is the territorial jurisdiction of the Sessions Courts;*

(a) *whether the sessions courts have the restriction of local limits of jurisdiction assigned to them;*

(b) *if no local limits of jurisdiction have been assigned to them, whether the sessions courts have the same local jurisdiction as the High Courts.*

[13] The law applicable in respect of the territorial jurisdiction of the Subordinate Courts is found in s 59, Part VI of the Subordinate Courts Act 1948 ('SCA 1948'). Section 59 states:

Constitution and territorial jurisdiction of Sessions Courts

59

(1) The Yang di-Pertuan Agong may, by order, constitute so many Sessions Courts as he may think fit and shall have power, if he think fit, to assign local limits of jurisdiction thereto.

(2) Subject to this Act or any other written law, *a Sessions Court shall have jurisdiction to hear and determine any civil and criminal cause or matter arising within the local limits of jurisdiction assigned to it under this section or, if no such local limits have been assigned, arising in any part of the local jurisdiction of the respective High Court.*

(3) Each Sessions Court shall be presided over by a President appointed by the Yang di-Pertuan Agong on the recommendation of the Chief Justice.

(4) Sessions Courts shall ordinarily be held at such places as the Chief Justice may direct, but should necessity arise they may also be held at any other place within the limits of their jurisdiction.

[14] Therefore s 59 of the SCA 1948 sets out the constitution and territorial jurisdiction of the sessions courts. In s 59(2) it is stated that the sessions courts have jurisdiction to hear cases within the local limits of jurisdiction assigned to them and if no such local limits have been so assigned, then their jurisdiction will be the jurisdiction of the respective High Courts.

[15] Another relevant provision in respect of the territorial jurisdiction is found in s 3 of the Courts of Judicature Act, 1964 (Act 91) ('CJA 1964'). Section 3 of the CJA 1964 define the terms 'High Court' and 'local jurisdiction' as below:

'High Court' means the High Court in Malaya and the High Court in Sabah and Sarawak or either of them, as the case may require.

'local jurisdiction' means:

(a) in the case of the High Court in Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Terengganu and the Federal Territory of Kuala Lumpur; and

(b) in the case of the High Court in Sabah and Sarawak, the territory comprised in

A the States of Sabah and Sarawak and the Federal Territory ofLabuan, including, in either case, the territorial waters and the air space above those States and the territorial waters;

B **[16]** Therefore s 3 of the CJA 1964, sets out the territorial jurisdiction of the two High Courts; the High Court in Malaya and the High Court in Sabah and Sarawak. The High Court of Malaya have territorial jurisdiction in Peninsular Malaysia or West Malaysia while the High Court of Sabah and Sarawak have territorial jurisdiction over the two states of Sabah and Sarawak or East
C Malaysia.

[17] The question then, based on the provisions mentioned above, what is the territorial jurisdiction of the sessions courts?

D **[18]** In deciding what is the territorial jurisdiction of the sessions courts, I am in agreement with the decision of *Public Prosecutor v Segaran a/l S Mathavan* that under s 59(1), only the Yang di-Pertuan Agong has the power to assign local limits of jurisdiction to the sessions courts. And since His Royal Highness
E has not made any such order under the said section, which order has to be gazetted, to assign the local limits of jurisdiction of each sessions court, then, s 59(2) comes into play; that is, if no such local limits have been assigned to the sessions courts, then the sessions courts have jurisdiction to hear and determine any cause or matter arising in any part of the local jurisdiction of the respective
F High Court. This mean that the sessions courts have the same local jurisdiction as the High Courts as defined under s 3 of the CJA 1964; that is the sessions courts in Malaya have jurisdiction which covers all states in Peninsular Malaysia or West Malaysia and the sessions courts in Sabah and Sarawak have jurisdiction which covers both the states of Sabah and Sarawak or East
G Malaysia.

[19] Therefore, the Sessions Courts of Malaya just like the High Courts of Malaya can sit anywhere, at any branch, in Peninsular Malaysia or West Malaysia. Likewise, the Sessions Courts of Sabah and Sarawak just like the
H High Courts of Sabah and Sarawak can sit anywhere, at any branch in Sabah and Sarawak or East Malaysia. The result is that both the High Courts and the sessions courts have the same territorial (local) jurisdiction and as such the sessions courts just like the High Courts enjoy concurrent and coordinate jurisdiction of each other.

I **[20]** Reverting back to our instant case, the position is that the sessions judge in Butterworth just like her counterpart in Shah Alam has territorial jurisdiction to hear and determine the plaintiff's claim since they enjoy concurrent as well as coordinate jurisdiction of each other.

[21] Therefore the answers to the first issue are:

(a) the sessions courts have no restriction of local limits of jurisdiction assigned to them. This is so since His Royal Highness the Yang di-Pertuan Agong has not assigned them their local limits of jurisdiction under s 59(1) of the SCA 1948 and;

(b) since no local limits of jurisdiction have been assigned to the sessions courts by His Royal Highness the Yang di-Pertuan Agong, the sessions courts then have the same local (territorial) limits of jurisdiction as the High Courts which mean the sessions courts just like the High Courts enjoy concurrent and coordinate jurisdiction of each other.

What is the 'forum conveniens' of this case: whether it is the Shah Alam, Selangor Sessions Court or the Butterworth, Penang Sessions Court

[22] The defendant contends that the 'forum conveniens' to try the said case is the Butterworth, Penang Sessions Court and not the Shah Alam, Selangor Sessions Court.

[23] Before delving into this issue, the section that gives jurisdiction to a sessions court to transfer a case to another sessions court is found in s 99A, Part X of the SCR 1980 Section 99A states:

'Further powers and jurisdiction of courts'

99A In amplification and not in derogation of the powers conferred by this Act or inherent in any court, and without prejudice to the generality of any such powers, every Sessions Courts and Magistrates' Court shall have the further powers and jurisdiction set out in the Third Schedule.

[24] The Third Schedule which is relevant to this appeal is in paras 2 and 3 which states:

'Stay of proceeding'

2 Power to stay proceedings unless they have been instituted in the District in which —

(a) the cause of action arose, or

(b) the defendant resides or has his place of business, or

(c) one of several defendants resides or has his place of business, or

(d) the facts on which the proceedings are based exist or are alleged to have occurred, or

(e) for other reasons it is desirable in the interests of justice that the proceedings should be had.

'Transfer of proceedings'

3

(1) (Repealed)

(2) Power, on application or of its own motion, to transfer any proceedings to another court of coordinate jurisdiction.

[25] Therefore the sessions court has the power to transfer the said case to another sessions court which is of coordinate jurisdiction. The question is whether from the facts of the case, it meets the criteria as specified in paras 2 and 3 and the principle or doctrine of 'forum conveniens'.

What is the principle or doctrine of 'forum conveniens'?

[26] 'Forum conveniens' or also termed as 'forum non conveniens' as defined by *Black's Law Dictionary*, (7th Ed) by Bryan A Garner are defined as below:

> *'forum conveniens'* means [Latin: 'a suitable forum'] The court in which an action is most appropriately brought, considering the best interests and convenience of the parties and witnesses. Cf. FORUM NON CONVENIENS.
>
> *'forum non conveniens'* means [Latin: 'an unsuitable court'] Civil procedure. The doctrine that an appropriate forum — even though competent under the law — may divest itself or jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might originally have been brought. Also termed forum inconveniens.
>
> Forum non conveniens allows a court to exercise its discretion to avoid the oppression or vexation that might result from automatically honoring plaintiffs forum choice. However, dismissal on the basis of forum non conveniens also requires that there be an alternative forum in which the suit can be prosecuted. It must appear that jurisdiction over all parties can be secured and that complete relief can be obtained in the supposedly more convenient court. Further, in at least some states, it has been held that the doctrine cannot be successfully invoked when the plaintiff is resident of the forum state since, effectively, on e of the functions of the state courts is to provide a tribunal in which their residents can obtain an adjudication of their grievances. But in most instances a balancing of the convenience to all the parties will be considered and no one factor will preclude a forum non conveniens dismissal, as long as another forum is available. Jack H. Friedenthal st al, Civil Procedure S 2.17, at 87-88 (2d. 1993).

[27] Therefore the terms are used interchangeably and it means, in brief, a most suitable or appropriate forum which take into consideration the best interests and convenience of the parties and witnesses.

[28] In the case of *American Express Bank Ltd v Mohamed Toufic Al-Ozier &*

Anor [1995] 1 MLJ 160, the Supreme Court held that the word 'conveniens' in forum non conveniens meant suitability or appropriateness of the relevant jurisdiction in the interests of all the parties and for the ends of justice and not one of convenience. The said court also held that *the onus is on the applicant to satisfy the court that some other forum is more appropriate*. The court stated:

> The doctrine of forum non conveniens appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v Cansulax Ltd (The Spiliada)* [1987] AC 460; [1986] 3 All ER 843; [1986] 3 WLR 972 after a series of decisions, as described and set out so well in that very interesting and readable joint article by RH Hickling and Wu Min Aun, 'Stay of Actions and Forum Non Conveniens' [1994] 3 MLJ xcvii.
>
> The main judgment in *The Spiliada* was delivered by Lord Goff, who adopted the dictum of Lord Kinnear in *Sim v F Robinow* (1892) 19 R (Ct of Sess) 665 at p 668 being the fundamental principle in regard to this doctrine, ie that 'there is some other tribunal, having competent jurisdiction, in which the case may be tried *more suitably for the interests of all the parties and for the ends of justice'. Lord Goff cautioned that the word 'conveniens' in forum non conveniens meant suitability or appropriateness of the relevant jurisdiction and not one of convenience*. We are in entire agreement with the fundamental principle so expressed.
>
> In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the court that 'some other forum is more appropriate' per Lord Templeman in *The Spiliada*.

[29] Therefore, has the defendant satisfy this court that the Butterworth, Penang Sessions Court is more appropriate or suitable in the interests of all the parties and for the ends of justice and not one of convenience than the Shah Alam, Selangor Sessions Court?

[30] In the case of *Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd* [2003] 5 MLJ 40, the court held that:

> The doctrine of forum convenience calls for the matter to be heard by a court which is more accessible and appropriate in the interest of all parties and for the ends of justice, notwithstanding that other courts also have territorial jurisdiction pursuant to s 23(1) of the Act (see *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112 at p 120).

[31] And in the case of *Khor Seow Kee v Boon Hock Sawmill Sdn Bhd* [1993] 4 CLJ 365 Abdul Malik JC, (as he then was), said at p 366:

> The legislature in creating a branch of the High Court in Malaya in each state, must have thought of bringing the High Court closer to the rakyat. Easy accessibility of the High Court would lessen the inconvenience of travelling (the amount of costs

A would not outweigh the inconvenience caused) and the incurring expense that would flow from it. This would, in turn, facilitate the disposal of cases and ease the backlog to a certain extent. This argument would likewise apply, with equal force, to the sessions court.

B **[32]** Therefore, is the Butterworth, Penang Sessions Court more accessible and appropriate for the parties in the circumstances?

[33] In our instant case, the cause of action clearly arose in Petaling Jaya C where all the transactions for the professional services rendered by the plaintiff were done in Petaling Jaya. The defendant himself had opted to open a case with the plaintiff, a legal firm situated in Petaling Jaya, to deal with his case. It is therefore unreasonable if the said case was to be transferred from Shah Alam to Butterworth since the plaintiffs witnesses, especially the plaintiffs staffs are D located in Shah Alam. Furthermore the expenses incurred for the witnesses and the plaintiff's staffs to attend the Butterworth Sessions Court would be far higher compared to the defendant's expenses to attend the Shah Alam Sessions Court. Therefore, I am of the view that the said case is more suitable and appropriate in the circumstances to be heard in Shah Alam, Selangor Sessions E Court. In this regard, the case of *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112, is of great assistance where it was held by Augustine Paul J, (as he then was), at p 127 as follows:

> In a contract for the payment of money the breach occurs when there is a failure to F pay the sum promised. This is logical as the meaning of 'cause of action' is the act on the part of the defendant which gives the plaintiff his cause of complaint (see *Jackson v Spittall* (1870) LR 5 CP 542). The failure to pay will be the cause of complaint That breach will have to be at the place where the payment is to be made and the cause of action will therefore accrue in that place (see *Bank Bumiputra (M) Bhd v Melewar Holdings Sdn Bhd & Ors* [1990] 1 CLJ 1246. Where there is no agreement G as to the place where the payment should be made then the payment should be made at the place where the plaintiff lives.

[34] Therefore, the forum conveniens is the Shah Alam, Selangor Sessions Court for the following reasons:

H

(a) the defendant himself had opted to open a case with the plaintiff, a legal firm situated in Petaling Jaya, to deal with his case.

(b) the plaintiff practice as an advocate and solicitor of the High Court of Malaya at No 705 Blok E, Phileo Damansara 1, No 9, Jalan 16/11, I 46350 Petaling Jaya, Selangor Darul Ehsan.

(c) the plaintiff also lives in the State of Selangor;

(d) the witnesses which includes the plaintiff's staffs are from or near Shah Alam, Selangor.

(e) the cause of action accrued in Selangor *(Malacca Securities Sdn Bhd v Loke Yu)* refers.

What is the effect of non-compliance to the procedural rules in making the application for transfer by the defendant

[35] As to the plaintiff's contention that the defendant's application to transfer the said case to Butterworth Sessions Court, Penang was defective for non-compliance to the procedural rules, this court agrees with the defendant's counsel, Mr Tan Kah Hoo that since the plaintiff has failed to give notice of any preliminary objections to the defendant, then the plaintiff is deemed to have waived his rights to raise such preliminary objections. This principle has been decided in the cases of *Mohammad Idres s/o Mohd Sulaiman Shah v Malayan Banking Bhd* [2001] 5 MLJ 111 (HC); *WJ Alan & Co Ltd V El Nasr Export & Import Co* [1972] 2 All ER 127; and *Usman bin Ahmad v Chin Brothers Construction Co* [2001] 5 MLJ 281 (HC).

CONCLUSION

[36] On examination of ss 59 and 99A of the SCA 1948 and s 3 of the CJA 1964 and the relevant cases, the Sessions Court Butterworth, Penang as well as the Shah Alam, Selangor Sessions Court; in fact any sessions courts throughout Peninsular Malaysia or West Malaysia have territorial jurisdiction to hear the said case since they enjoy concurrent and coordinate jurisdiction of each other. This is so since no local limits of jurisdiction has been assigned to each sessions courts by His Highness, the Yang di-Pertuan Agong. As such the sessions courts have jurisdiction to hear and determine any cause or matter arising in any part of the local jurisdiction of the respective High Courts which mean the Sessions Courts of Malaya just like the High Courts of Malaya can sit anywhere, at any branch, in Peninsular Malaysia or West Malaysia since they have the same local jurisdiction. Be as it may, the deciding factor as to whether which court is more suitable and appropriate depends on the forum conveniens of the case. In this appeal the applicant (defendant) has the onus to satisfy this court that the Butterworth, Penang Sessions Court is the more appropriate forum. This the applicant has failed to do. Considering that the defendant himself had opted to open a case with the plaintiff, a legal firm situated in Petaling Jaya to deal with his case, the plaintiff resides and carries on his business in Petaling Jaya, the witnesses are mainly from or near Shah Alam and the cause of action accrued in Selangor, the said case is more suitable and appropriate, in the circumstances, to be heard in the Sessions Court in Shah Alam, Selangor. Therefore, the plaintiff is entitled to proceed on with the said case in the Shah Alam Sessions Court.

[37] To sum up, this court finds that the learned sessions judge has erred in allowing the defendant's application to transfer the said case to the Butterworth, Penang Sessions Court. The said case should have remained in the Sessions Court Shah Alam, Selangor. Therefore, the appeal ought to be and is thereby allowed. The decision of the learned sessions judge which was given on 31 March 2010 is hereby set aside.

[38] Appeal allowed. No order as to costs.

Appeal allowed with no order as to costs.

Reported by Ashok Kumar